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No. 00-907

In the Supreme Court of the United States

RONALD L. FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff can avoid the statutory bar under the Federal Tort Claims Act on recovery for claims arising out of assault and battery, 28 U.S.C. 2680(h), by pleading that the government was negligent in hiring or supervising the government employee who committed the assault or battery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 233 F.3d 579 (Table). The order of the district court (Pet. App. 4-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2000. The petition for a writ of certiorari was filed on November 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA) alleging that the United States negligently

failed to prevent a violent assault perpetrated on petitioner by fellow Postal Service employee Ricky Williams. Petitioner alleges that Williams struck and shot at him with a handgun while petitioner was departing from the parking lot of the Atlanta Bulk Mail Center after work. Petitioner further alleges that this incident stemmed from a workplace dispute between petitioner and Williams's wife, who was one of petitioner's supervisors. The complaint alleges negligence by the Postal Service in supervising Williams and in failing to provide adequate security for employees at the Bulk Mail Facility. Pet. App. 1-2.

The district court granted the government's motion to dismiss for lack of subject matter jurisdiction. Pet. App. 4-12. The court held that the "assault" and "battery" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h), bars the claim. Pet. App. 11. Alternatively, the district court held that the government could not be held liable under Georgia law for Williams's intervening criminal conduct. *Ibid.* The district court did not reach the government's defenses based on the discretionary function exception. *Ibid.*; see 28 U.S.C. 2680(a).

The court of appeals affirmed in an unpublished opinion. Pet. App. 1-3. That court held that because petitioner's complaint does not allege breach of an independent, antecedent duty unrelated to Williams's employment status, it is simply a claim for negligent supervision barred by the FTCA's "assault and battery" exception. *Id.* at 3. The court of appeals also held that Georgia law bars petitioner's claims because the proximate cause of his injuries was the conduct of an intervening third party rather than conduct by the United States. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Every court of appeals that has considered the issue except the Ninth Circuit has held that a plaintiff cannot avoid the FTCA's bar on recovery for claims arising out of assault or battery by pleading negligent hiring and supervision against the United States. Even though there is a conflict between the decision below and decisions of the Ninth Circuit, this case is not an appropriate one to resolve that conflict because an adequate state law ground supports the judgment.

1. The FTCA provides the exclusive remedy for tort actions against the United States. The remedy is limited to those claims for which the FTCA clearly and explicitly waives sovereign immunity. 28 U.S.C. 2679(a) and (b)(1). The United States has not waived immunity for claims for intentional torts; the statute expressly bars recovery for "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h).[1]

This Court has considered the scope of the intentional tort exception in three cases. See *Sheridan* v. *United States*, 487 U.S. 392 (1988); *United States* v. *Shearer*, 473 U.S. 52 (1985); *United States* v. *Muniz*, 374 U.S. 150 (1963). Contrary to petitioner's suggestion (Pet. 6-9), none of these cases holds or even intimates that a plaintiff may circumvent the statutory bar on recovery for injuries arising out of an assault and

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[1] Section 2680 provides, "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680 and (h).

battery by pleading that the United States was negligent in hiring or supervising the assailant. In *Shearer*, this Court held that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), barred recovery under the FTCA. 473 U.S. at 59. Four of the eight sitting Justices also would have held that the assault and battery exception barred a claim for negligent failure to prevent a battery by a serviceman allegedly known to have violent propensities. *Id.* at 54-57. Three years later in *Sheridan*, this Court held that claims based on an independent duty, such as a duty to protect a victim or a good-samaritan duty, are not barred by the assault and battery exception where the assailant is not a federal employee or is a federal employee acting outside the scope of his employment. 487 U.S. at 400. The Court expressly declined to consider whether claims based on an employment relationship (negligent hiring, supervision or training) are barred by the assault and battery exception. *Id.* at 403 n.8.[2] *Muniz* dealt with the narrow question whether prisoners can sue under the FTCA. 374 U.S. at 165. Notably, *Muniz* assumed that the government could assert the intentional tort exception as a defense to liability on remand. *Id.* at 163 (noting that the government is not liable for the intentional torts of its employees). There is no conflict between the decision below and decisions of this Court.

Moreover, contrary to petitioner's contention (Pet. 8-9), petitioner's complaint does not present a question regarding negligence "entirely independent of [the

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[2] In a concurring opinion, Justice Kennedy stated that he would have reached the reserved question and would have held that a plaintiff may not maintain a claim based only on the employment relationship between the intentional tortfeasor and the government. 487 U.S. at 404.

attacker's] employment status." The allegations in the complaint concern the Postal Service's alleged negligence in failing to supervise Williams and failing to prevent him from assaulting petitioner. There is no allegation of breach of an independent, antecedent duty by the United States.[3]

2. With the exception of the Ninth Circuit, all the courts of appeals that have considered the issue since *Sheridan* have held, consistent with the decision of the Eleventh Circuit below, that the statutory bar on recovery for claims arising out of assaults and batteries cannot be circumvented by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See, *e.g.*, *Leleux* v. *United States*, 178 F.3d 750, 757 (5th Cir. 1999) (barring claim of negligence against United States in seduction of recruit by Naval officer because negligence did not arise out of "an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States"); *Perkins* v. *United States*, 55 F.3d 910, 916-917 (4th Cir. 1995) (rejecting "negligent supervision" and "negligent retention" claims); *Franklin* v. *United States*, 992 F.2d 1492, 1498-1499 (10th Cir. 1993) (barring claim of negligence against United States in case of medical battery by VA hospital employee because claim was contin-

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[3] Petitioner argues (Pet. 9) that the Postal Service violated a Georgia statute, Ga. Code Ann. § 34-2-10 (1998), which requires that every employer provide a reasonably safe workplace. If petitioner is claiming that the Postal Service's breach of duty caused a workplace injury, his exclusive remedy is under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* See *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 191 (1983) (under 5 U.S.C. 8116(c), "a federal employee may not bring a tort suit against the Government on the basis of a work-related injury").

gent on employment relationship); *Guccione* v. *United States*, 847 F.2d 1031, 1037 (2d Cir. 1988), reh'g denied, 878 F.2d 32, 33 (1989) (barring claim that United States was negligent in failing to supervise undercover agent because claim was not "entirely independent" of employment relationship), cert. denied, 493 U.S. 1020 (1990).

These decisions are consistent with pre-*Sheridan* decisions of numerous courts of appeals. See, *e.g.*, *Thigpen* v. *United States*, 800 F.2d 393, 395-396 (4th Cir. 1986) (barring assertion of a negligent supervision claim against United States by children who were sexually assaulted by naval hospital employee); *Hoot* v. *United States*, 790 F.2d 836, 838 (10th Cir. 1986) (dismissing suit alleging that assault occurred because of government negligence in denying soldier's request for mental examination and treatment); *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir.) (holding that negligence claim arose out of excepted claim where underlying conduct, which constituted intentional tort, was essential to claim), cert. denied, 479 U.S. 930 (1986); *Johnson* v. *United States*, 788 F.2d 845, 850-854 (2d Cir.) (dismissing suit alleging that assault occurred because of government negligence in employment and supervision of postal employee who assaulted infant), cert. denied 479 U.S. 914 (1986); *Garcia* v. *United States*, 776 F.2d 116, 118 (5th Cir. 1985) (dismissing claim of negligent supervision of military recruiter who sexually assaulted a prospective recruit). As noted, however, the Ninth Circuit has held that the statutory bar on recovery for claims arising out of assaults and batteries can be avoided by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See *Senger* v. *United States*, 103 F.3d 1437, 1442 (9th Cir.

1996) (jurisdiction over negligent hiring and supervision claim); *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995) (same); see also *Bennett* v. *United States*, 803 F.2d 1502, 1503-1504 (9th Cir. 1986) (negligent hiring and supervision).[4]

This case is not an appropriate vehicle for this Court to resolve the conflict between the views of the Ninth Circuit and the other courts of appeals that have considered the question. An adequate state law ground supports the judgment. The FTCA provides that the tort law of the State where the act or omission occurred governs liability. 28 U.S.C. 1346(b). The Eleventh Circuit held that even if petitioner could state a claim that was not barred by Section 2680(h), he would have no cause of action under Georgia law because the proximate cause of his injuries was conduct by an intervening third party rather than conduct by the United States. Pet. App. 3a (citing 28 U.S.C. 1346(b)(1) and *Griffin* v. *AAA Auto Club South, Inc.*, 470 S.E.2d 474, 476-477 (Ga. Ct. App. 1996)).

This Court "do[es] not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law." *UNUM Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358, 368 (1999) (citing *Runyon* v. *McCrary*, 427 U.S. 160, 181-182 (1976)). Moreover, this Court generally defers to the lower federal courts'

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[4] A separate line of cases holds that negligent conduct, undertaken within the scope of employment and arising from breach of an independent, antecedent duty to protect the victim separate from a duty to prevent the assault, states a claim under the FTCA. See, *e.g.*, *Bembenista* v. *United States*, 866 F.2d 493, 498 (D.C. Cir. 1989) (breach of duty to protect blind, comatose hospital patient from sexual assault); *Doe* v. *United States*, 838 F.2d 220, 224 (7th Cir. 1988) (breach of duty to supervise children in government daycare). That issue is not presented in this case.

interpretations of state law. *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."). Accordingly, the district court properly dismissed petitioner's complaint because it did not state a claim under Georgia law. That state law ground, upheld by the court of appeals, adequately supports the judgment. Certiorari is therefore inappropriate to consider the alternative federal law ground for the judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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